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Supreme Court of the United States

OCTOBER TERM, 1941.

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. BERNARD S. COGAN,
Petitioner-Appellant,

vs.

MARY MANN,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Bernard S. Cogan, prays for a writ of certiorari to the Court of Appeals of the State of New York to review the decree of that Court in this cause filed February 27, 1942.

Summary Statement of the Matter Involved.

The petitioner and respondent were married in New York City in 1930 and had two children Mary Sheridan and Timothy, born in 1932 and 1935 respectively (fol. 18). The respondent sought a Reno divorce in 1940. Petitioner appeared in the action and the divorce was granted in August, 1940.

Petitioner, after consulting his parish priest consented to an agreement (fol. 23) to be incorporated into the Reno decree granting custody of the children to respondent except during July and August of each year and providing that if the children are not brought up in the Catholic faith, petitioner can have them on demand. On September 6, 1940 respondent married a non-catholic.

In August, 1941 the petitioner had the children lawfully at his mother's home in the State of Massachusetts (fol. 27) under the terms of the Reno decree, and in September, 1941 entered them in a parochial school (fol. 40), refused to deliver them to the respondent in New York State on the ground the respondent had failed to bring the children up in the Catholic faith, and other grounds (fols. 28, 29).

The respondent thereupon obtained a writ of habeas corpus which was served on petitioner in the State of New York, requiring petitioner to forthwith bring the children into the State of New York. Petitioner moved to dismiss for lack of jurisdiction over the children (fol. 30) which motion was summarily overruled, and brought the children into New York State by order of the Court without waiving objections to the jurisdiction (fol. 31). Some testimony was taken and the court summarily ordered that the children be delivered to the respondent in enforcement of the Reno decree (fol. 59) notwithstanding that the court found that it was more fortunate for the children to be with the father in Massachusetts, which they preferred (fol. 48).

The Question Raised.

The question raised is whether the Supreme Court of New York acquired jurisdiction by service of a writ of habeas corpus upon the petitioner within the State of New York to summarily enforce a Reno custody decree and adjudicate the custody of children residing and attending school in Massachusetts.

Jurisdiction of the Supreme Court of the United States in This Proceeding.

This writ is to review a final decree of the Court of Appeals of the State of New York, the highest court of the state, entered February 27, 1942.

Jurisdiction of this court is invoked under U. S. Judicial Code, Section 237, 28 U. S. C. A. 344. Petitioner claims that the exercise of jurisdiction over the said children of petitioner by writ of habeas corpus in the State of New York, when the children were actually living and attending school in the State of Massachusetts and the summary enforcement of a Reno custody decree were in violation of the "due process" clause of the United States Constitution. Petitioner was overruled on jurisdictional objections (fol. 30).

Petitioner believing that the children were held by null and void orders obtained a new writ of habeas corpus in the Appellate Division of the Supreme Court of the State of New York returnable September 29, 1941 (fol. 12) to recover the children and restore status quo.

The petition on which said writ was issued (fols. 16-45) particularly set forth (fol. 44) that the hearing on the first writ "was no hearing at all, was without jurisdiction and any order pursuant thereto was a denial of liberty in violation of the 'due process' clause."

The second writ was summarily dismissed on motion on the ground that the plea of lack of jurisdiction of the court on the first writ was not established (fols. 63-68) and unanimously affirmed by the Appellate Division (fol. 81), November 28, 1941, on the ground that no direct appeal from the first writ was before the court.

An appeal was taken to the Court of Appeals of the State of New York as a matter of right pursuant to Section 588 of the Civil Practice Act on the ground that

there was directly involved "the construction of the Constitution of this state and of the United States". The petitioner urged that if the Supreme Court of the State of New York on the first writ acquired no jurisdiction "then the appellant and the children had been deprived of their rights without "due process" of law in violation of the State and Federal Constitution".

The Court of Appeals unanimously affirmed the Appellate Division, February 26, 1942. If there had been no constitutional question raised then there would have been no jurisdiction as a matter of right and the court would have been obliged to dismiss the appeal.

> Valz v. Sheepshead Bay Bungalow Corp., 247 N. Y. 122.

Reasons Relied on for Allowance of Writ.

The reasons relied on for the allowance of the writ are that the highest court of the State of New York has decided a federal question of substance not heretofore determined by this court and of great public importance.

The question deals with the most personal rights of children and may seriously effect the entire future religion, character and bringing up of the said children which should not be allowed if there is any question of the court's jurisdiction and particularly where the decision occurred as the result of a summary proceeding without a full fair hearing.

The petitioner appealed directly from the first writ; sought to stay such appeal while proceeding directly on the second writ to test the jurisdiction of the first writ. The appeal was extended by stipulation until the final decision of the Court of Appeals, but the respondent refused further extension pending this petition and an order was entered in the Appellate Division dismissing the appeal

so that petitioner has no other way* of ever raising the questions adjudicated except on this writ.

WHEREFORE, your petitioner respectfully prays for a writ of certiorari to be issued under the seal of this court directed to the Court of Appeals of the State of New York, commanding said court to certify and send to this court on a day to be designated, a true and complete transcript of the record and proceedings of the Court of Appeals for the State of New York to the end that this cause may be reviewed and determined by this court; that the judgment of the Court of Appeals of the State of New York may be reversed and that petitioner be granted such other and further relief as may be proper.

BERNARD S. COGAN,
By CARL E. RING,
Attorney for Petitioner.

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*Before the first writ was obtained and before the time to surrender the children, petitioner, to show good faith brought a plenary action in the Supreme Court of the State of New York to determine rights as between the parties and to confirm his claim to custody (fol. 29). After the commencement of the present proceedings, and hence not in the record, the plenary action was dismissed on motion of the respondent on the ground that petitioner could not attack the Reno decree even insofar as it affected the children who had never been in the State of Nevada.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

The Supreme Court of the State of New York acquired no jurisdiction on the first writ of habeas corpus.

The matrimonial domicile of the family and parties was lost by the divorce and jurisdiction, especially summary jurisdiction, of the children thereafter would depend on their residence and presence.

When the children were residing in and attending school in Massachusetts the courts of New York had no jurisdiction over them.

> *Finlay* v. *Finlay*, 240 N. Y. 429;
> *Matter of Hubbard*, 82 N. Y. 91.

No decree or statute of New York (nor of Nevada) was violated when petitioner took his children to Massachusetts and the New York court had no right to order him to bring them into New York in order to obtain jurisdiction over them to try custody. Nor can jurisdiction be acquired by such order over objection.

> *Kamp* v. *Kamp*, 59 N. Y. 212, 215.

The Reno decree as a divorce concerning status may be entitled to full faith and credit but the Reno decree of custody cannot have and cannot be intended to have any effect outside of the State of Nevada.

> *People ex rel. Jones* v. *Johnson*, 205 A. D. 190;
> *People* v. *Dewey*, 23 Misc. 267;
> *Matter of Stewart*, 77 Misc. 524.

These children were never in Nevada and were in Massachusetts when the divorce was obtained.

The sovereign power of New York has limited the powers of the courts in habeas corpus proceedings as follows:

A. Section 1230, Civil Practice Act. To release when restrained or imprisoned "within the state".

B. Section 70, Domestic Relations Law; over children when the parents are separated but not divorced.

C. The Common Law writ. Limited to releasing children from illegal restraint within the state; not to try rights between parties, People ex rel. Pruyne v. Walts, 122 N. Y. 238, 241; is limited by the doctrine of parens patriae to "regulate the custody of infants found within the territory", Judge Cardozo in Finlay v. Finlay, 240 N. Y. 429; and this jurisdiction of necessity can only be exerted in respect of persons or property within the state (Matter of Hubbard)."

In *People* v. *Bork*, 96 N. Y. 188, the Court of Appeals said, at page 199.

> "It does not need the citation of authorities to the proposition that judicial power can only be exercised according to law, and that an attempt by an unauthorized tribunal to render judgment involving life, liberty or property, is a mere nullity. No man can be deprived of either without due process of law; nor can anyone exercise the judicial function without investiture by the sovereign power.

POINT II.

Jurisdiction of the court on the respondent's writ was properly raised by the petitioner's writ.

In neither of the courts below on the second writ did respondent attempt to sustain the jurisdiction of the court on the first writ but merely contended that the first court had ruled on the question of its own jurisdiction and this could only be attacked by direct appeal, relying on *O'Donoghue* v. *Bois,* 159 N. Y. 87, which states:

> "It is always open to the party against whom the judgment is offered to prove the want of jurisdiction in the court, even though such proof contradicts recitals in the record."

Except

> ". . . in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction."

No jurisdictional fact was litigated in favor of respondent. The only jurisdictional fact litigated was the residence and presence of the children in Massachusetts attending school which was against and not in favor of the party who averred jurisdiction.

It is doubtful if the exception is constitutional where liberty is involved for it would limit the writ of habeas corpus.

People ex rel. Tweed v. *Liscomb,* 60 N. Y. 559.

If the first court had no jurisdiction then the children were brought into the state and are detained against their will pursuant to void orders (the court even found that it was more fortunate for the children to be in Massachusetts

with their father which they preferred) and can be released by writ of habeas corpus, New York Civil Practice Act, Sections 1230 and 1253.

> "One is not bound to appeal from a void order or judgment but may resist it or assert its validity at all times."
>
> *Kamp* v. *Kamp*, 59 N. Y. 212, 215.

And one may review the question of jurisdiction even in the same or a lower court. People ex rel. Tweed v. Liscomb, 60 N. Y. 559.

> "While a party cannot review a judgment under the guise of a writ of habeas corpus, yet where his custody is unauthorized or unlawful, it seems quite clear that he has a right to that remedy to procure his discharge."
>
> *People ex rel. Harris* v. *Gill*, 85 A. D. 192, 194.

CONCLUSION.

For the foregoing reasons, we urge that a writ of certiorari be issued as prayed for to review this case.

Respectfully submitted,

CARL E. RING,
Attorney for Petitioner.

RING AND MURRAY,
of Counsel.

New York City,
May 4, 1942.

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MARY MANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT MARY MANN IN OPPOSITION

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BRIEF FOR THE RESPONDENT MARY MANN IN OPPOSITION

Opinion Below

There was no opinion of the Court of Appeals of the State of New York.

Jurisdiction

The petitioner invokes jurisdiction under Title 28, U. S. C., Section 344.

Question Presented

There is no Federal question presented which this Court has power to review.

Statement

The petitioner seeks this writ to review a final decree of the Court of Appeals of the State of New York, entered February 26, 1942 (R. 29), which affirmed an order of the Appellate Division of the Supreme Court, First Department (R. 26), which affirmed an order of the Supreme Court, New York County, dated September 29, 1941 (R. 3), dismissing a writ of *habeas corpus* obtained by Bernard S. Cogan, the petitioner, directed to his former wife, Mary Mann, the respondent, for the purpose of determining the custody of their children (R. 4).

It appeared from the return (R. 17) to the said writ that prior to the entry of the order of September 29, 1941 (R. 3), on September 25, 1941, the Supreme Court, New York County, in a *habeas corpus* proceeding brought by Mary Mann had held that Bernard S. Cogan was unlawfully detaining the said children and directed the return of the children to the custody of their mother, Mary Mann (R. 19).

It appeared and was determined in that proceeding that Mary Mann was entitled to the custody of the said children by the terms of a separation agreement between the parties, dated June 20, 1940, the terms of which have been incorporated in a decree of divorce in an action in Nevada brought by Mary Mann against Bernard S. Cogan, in which action Cogan appeared (R. 18, 19).

Argument

There is no question presented which this Court has the power to review.

The only question determined by the Court of Appeals of the State of New York was that the writ obtained by

Bernard S. Cogan was properly dismissed. Cogan, having sought jurisdiction of that Court, cannot now question its jurisdiction.

Cogan's remedy if he wished to question the jurisdiction of the Supreme Court of the State of New York, was to prosecute his appeal from the order of September 25, 1941, awarding custody of the children to Mary Mann (R. 19). The petitioner, in his brief, at the bottom of page 4, admits that he did not prosecute this appeal, and that it was dismissed. This remedy was pointed out to petitioner in the opinion of the Appellate Division, First Department, on November 28, 1941, in the first *habeas corpus* proceeding (R. 27).

The question of jurisdiction of the Supreme Court, New York County, was raised by Cogan, the petitioner, in the first *habeas corpus* proceeding and decided against him (R. 10, 11, 21).

Under the practice in New York State, a writ of *habeas corpus* may not be used to review a decree of a court of competent jurisdiction, where the question of jurisdiction has already been litigated, the proper remedy being by an appeal from the decree determining jurisdiction. New York Civil Practice Act, Section 1231, Subdivision 2.

People ex rel. Holt v. *Lambert*, 237 A. D. 39, at 41 (affirmed 262 N. Y. 511, without opinion):

> "While it is true as a general rule that lack of jurisdiction to render a particular judgment is always open to question under a writ of *habeas corpus*, there is a well-recognized exception to such rule, and that is, where the question of jurisdiction has already been litigated. As said in *O'Donoghue* v. *Boies* (159 N. Y. 87, 99): 'There is but one solitary exception to this rule, and that is in a case where jurisdic-

tion depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive on that question until set aside or reversed by a direct proceeding.' "

CONCLUSION

There being no question presented which this Court has jurisdiction to review, we respectfully submit that the petition for a writ of certiorari should be denied, with costs to the respondent.

WELLMAN, SMYTH, LOWENSTEIN & FENNELLY,
Attorneys for Respondent.

LEO C. FENNELLY,
Of Counsel.